



# **Base Realignment and Closure (BRAC): Transfer and Disposal of Military Property**

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## Summary

The Defense Base Closure and Realignment Act of 1990 (P.L. 100-526) and the Federal Property and Administrative Services Act of 1949 (P.L. 81-152) provide the basic framework for the transfer and disposal of military installations closed during the base realignment and closure (BRAC) process. In general, property at BRAC installations is first subjected to screening for use by the Department of Defense and by other federal agencies. If no federal use for the property can be found or if an application for transfer is rejected, the property is deemed “surplus” to the needs of the federal government and made available for disposal through other mechanisms.

At this point, BRAC property is subjected to two simultaneous evaluation processes: the redevelopment planning process performed by a local redevelopment authority composed of various interested representatives of the community affected by the BRAC action; and a Department of Defense analysis prepared under the aegis of the National Environmental Policy Act and, eventually, informed by the local redevelopment plan.

As a part of this process, screening of the property must be performed to determine if a homeless assistance use would be appropriate. There are also a variety of “public benefit transfers,” under which the property may be conveyed for various specified public purposes at reduced cost. It is also possible to dispose of BRAC property through the use of a public auction or negotiated sale, for which fair market value or a proxy for fair market value must generally be obtained. Finally the law governing the BRAC process authorizes economic development conveyances, through which a local redevelopment authority may obtain the property for specified purposes, sometimes for no consideration.

The BRAC property transfer process has been altered, both legislatively and administratively, throughout the numerous authorized closure rounds. Most recently, the National Defense Authorization Act for Fiscal Year 2010 (P.L. 111-84) amended the law with respect to economic development conveyances at no cost to local redevelopment authorities. This report provides an overview of the various authorities available under the current law and describes the planning process for the redevelopment of BRAC properties.

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## Introduction

The nation's military installations have gone through several rounds of base realignments and closures (BRAC), the process by which excess military facilities are identified and, as necessary, transferred to other federal agencies or disposed of, placing ownership in non-federal entities. Since the enactment of the Defense Base Closure and Realignment Act of 1990, as amended (Base Closure Act), transfer or disposal of former military installations has been governed by relatively consistent legal requirements.

On December 28, 2001, a round of base closures was authorized by Congress.<sup>1</sup> The BRAC process requires the Secretary of Defense to prepare and submit a list of military installations recommended for closure or realignment to the congressional defense committees and an independent commission.<sup>2</sup> The independent BRAC Commission, created by the Base Closure Act,<sup>3</sup> is required to review and analyze the Department of Defense's (DOD) recommendations and submit a report to the President with findings and conclusions that accept, reject, and/or modify the recommendations.<sup>4</sup> The President reviews the BRAC Commission report, and upon acceptance of the recommendations, submits it to Congress.<sup>5</sup> If the President fails to submit the recommendations to Congress within the timeframe required under the Base Closure Act, the BRAC process is terminated.<sup>6</sup> Upon receipt of the report from the President, Congress has the opportunity to disapprove of the recommendations through the enactment of a joint resolution.<sup>7</sup> The 2005 BRAC Commission considered 190 separate DOD recommendations, a number exceeding the number of recommendations considered by all previous BRAC Commissions combined.<sup>8</sup> Ultimately, the BRAC Commission recommended a total of 182 closures or realignments with an estimated savings to the taxpayer of \$15 billion over 20 years.<sup>9</sup> The recommendations were accepted by the President and forwarded to Congress.<sup>10</sup> Congress did not disapprove of the report and, therefore, the recommendations became law on November 9, 2005.<sup>11</sup>

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<sup>1</sup> National Defense Authorization Act for Fiscal Year 2002, Act of December 28, 2001, P.L. 107-107, 115 Stat 1012 (current version at 10 U.S.C. § 2687 note).

<sup>2</sup> Base Closure Act at § 2903(c).

<sup>3</sup> *Id.* at § 2902.

<sup>4</sup> *Id.* at § 2903(c).

<sup>5</sup> *Id.* at § 2903(e) (The President may disapprove all or part of the recommendations, in which case, the report is returned to the Commission. The Commission must then submit a revised list to the President. If the President approves the revised list, it is forwarded to Congress, but if the President does not approve the revised list, the BRAC process is terminated.).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at § 2904(b).

<sup>8</sup> The Defense Base Closure and Realignment Commission, *2005 Defense Base Closure and Realignment Commission Report*, Executive Summary, September 2005 (Available online at <http://www.brac.gov>).

<sup>9</sup> *Id.*

<sup>10</sup> In *Dalton v. Specter*, 511 U.S. 462 (1994), the U.S. Supreme Court held that actions by the Secretary of Defense and the BRAC Commission are not reviewable final agency actions within the meaning of the Administrative Procedure Act (APA), since their reports recommending base closings carry no direct consequences. However, the action of the President will directly affect bases and, as such, is the final action affecting the military installations; but because the President is not an agency under the APA, that action is not reviewable under the act. The Court further held that where a statute commits decision-making to the President's discretion, judicial review of his decision is not available.

<sup>11</sup> Donna Miles, "BRAC Deadline Expires; DOD to Begin Closures, Realignments," *American Forces Press Service*, (continued...)

The current BRAC law is similar to the original statute and retains many of the transfer authorities that were available in previous rounds. Significant amendments in 1999 and 2001 altered portions of the law's disposal authorities, including requirements related to economic development conveyances. Consequently, DOD promulgated new regulations to implement the property disposal authorities available for the 2005 round.<sup>12</sup> However, in 2009, Congress amended the law as it relates to economic development conveyances requiring DOD to issue revised regulations. This report provides an overview of the transfer and disposal authorities available under the law for military installations closed during the 2005 round, and indicate how amendments to the Base Closure Act have altered the property transfer and disposal process.<sup>13</sup> It also describes DOD's regulations implementing the amended Base Closure Act.

## **Transfer, Disposal, and Leasing Authorities**

The transfer or disposal of federal property is primarily performed by the General Services Administration (GSA) pursuant to the Federal Property and Administrative Services Act of 1949 (FPASA).<sup>14</sup> The Base Closure Act directs the Administrator of the GSA to delegate specified transfer and disposal authorities to DOD for use at BRAC installations, and DOD has, in turn, delegated this authority to the various military departments.<sup>15</sup> Thus, BRAC property transfer and disposal is performed, generally, in accordance with the FPASA and the GSA regulations implementing it. In addition, the Base Closure Act authorizes DOD, with GSA approval, to supersede GSA regulations with BRAC-specific regulations.<sup>16</sup>

Apart from the transfer and disposal authorities typically available for federal property, the Base Closure Act and other provisions of law authorize a variety of other conveyance mechanisms. The available authorities include: public benefit transfers, economic development conveyances (at cost and no cost), negotiated sales to state or local governments, conservation conveyances, and public sales.<sup>17</sup> In some cases, the analysis and use of particular authorities must precede analysis and use of others. On the other hand, there are many transfer and disposal mechanisms that are given roughly equivalent priority; thus analysis and use of them may occur simultaneously.

In addition to DOD's role in making disposal and transfer determinations, the Base Closure Act also provides a substantial role for states and communities in the property redevelopment planning process. Thus, local communities can significantly affect the BRAC property transfer

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(...continued)

*News Articles*, November 9, 2005.

<sup>12</sup> 32 C.F.R. pt. 174.

<sup>13</sup> It should be noted that significant issues related to environmental cleanup under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) exist at some BRAC properties and that the use of certain property transfer authorities may be contingent upon adequate performance of CERCLA obligations or agreement by the acquiring entity to accept liability for environmental cleanup. See 42 U.S.C. § 9620(h); P.L. 107-107, § 3006. For background on environmental cleanup issues and BRAC, see CRS Report RS22065, *Military Base Closures: Cleanup of Contaminated Properties for Civilian Reuse*, by David M. Bearden.

<sup>14</sup> Act of June 30, 1949, ch. 288, 63 Stat 377. Transfer and disposal authority is codified at 40 U.S.C. §§ 521-559.

<sup>15</sup> Base Closure Act, § 2905(b); 32 C.F.R. § 174.5.

<sup>16</sup> Base Closure Act, § 2905(b).

<sup>17</sup> 32 C.F.R. § 174.4(b).

and disposal decisions made at the federal level. The specific roles for states and communities as well as the various transfer and disposal authorities are discussed below.

## **Local Redevelopment Authorities (LRAs)**

Pursuant to the act, an LRA is “any entity (including an entity established by a State or local government) recognized by the Secretary of Defense as the entity responsible for developing the redevelopment plan with respect to the installation or for directing the implementation of such plan.”<sup>18</sup> DOD must prepare an environmental impact analysis under the National Environmental Policy Act (NEPA), in which it must examine all reasonable disposal alternatives and make its own disposal decisions.<sup>19</sup> However, LRAs are responsible for designing a comprehensive plan for reuse of BRAC property, culminating in a redevelopment plan, which is submitted to DOD and included as part of the proposed federal action.<sup>20</sup> While the redevelopment plan is not binding on DOD, it may have significant influence on its disposal decisions, and, in some instances, DOD is statutorily directed to give the plan considerable weight.<sup>21</sup> Local zoning authorities and state land use regulations may also impact the disposal decisions made by DOD.

The Base Closure Act does not establish statutory requirements for the formation of LRAs. DOD regulations provide that the LRA should have “broad-based membership, including, but not limited to, representatives from those jurisdictions with zoning authority over the property.”<sup>22</sup> The regulations further state that “[g]enerally, there will be one recognized LRA per installation.”<sup>23</sup> In the event that a LRA is not recognized by DOD, or if the LRA fails to timely submit a redevelopment plan, the Secretary concerned is required to consult with the state’s Governor and heads of local governments before proceeding with the disposal of the property according to applicable laws.<sup>24</sup>

## **Transfers for Federal Utilization**

It is DOD policy to act expeditiously under the BRAC process, whether it is the closing or realigning of an installation, in order to facilitate the transfer of real property for community reuse.<sup>25</sup> Prior to consideration of transfer to a non-federal entity, the property must be screened for continued federal use.

## **DOD Components or Other Agencies**

The first step in the property transfer process begins when the military service in possession of a BRAC property notifies other DOD components and federal agencies that property is in

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<sup>18</sup> Base Closure Act, § 2910(9).

<sup>19</sup> 42 U.S.C. §§ 4321 *et seq.*

<sup>20</sup> 32 C.F.R. § 174.6.

<sup>21</sup> The specific requirements impacting the LRA planning process and DOD’s eventual disposal of property are discussed in the sections of this report addressing each disposal mechanism.

<sup>22</sup> 32 C.F.R. § 174.6(a).

<sup>23</sup> *Id.*

<sup>24</sup> Base Closure Act, § 2905(b)(3)(B); 32 C.F.R. § 174.6(c)(2).

<sup>25</sup> 32 C.F.R. § 174.4.

“excess”<sup>26</sup> to its needs and has become available.<sup>27</sup> If a DOD component or other federal agency wishes to acquire BRAC property, it must “provide a written, firm expression of interest ... [and] explain the intended use and the corresponding requirement for the buildings and property” within thirty days of the notice of availability,<sup>28</sup> followed by an application for transfer of the property.<sup>29</sup> The application must support a variety of transfer requirements, including that the property requested be better suited to the requestor’s needs than its existing property or other properties and that the transfer would not create a new government program.<sup>30</sup> During the federal screening, the Secretary concerned is required to keep the LRA informed of the progress and to provide contact information for federal agencies so that the LRA may be involved.<sup>31</sup> DOD components and other agencies are encouraged to include the LRA, if it exists, in discussions related to the proposed use of the property.<sup>32</sup> Ultimately, it is the responsibility of the transferring DOD component to review the applications and make a determination as to whether the transfer is appropriate based on several factors:

- the requirement for additional property must be valid and appropriate;
- the proposed use is consistent with the highest and best use of the property;
- the proposed transfer will not have an adverse impact on the transfer of any remaining portion of the installation;
- the proposed transfer will not establish a new program or substantially increase the level of a component’s or agency’s existing programs;
- the application offers fair market value for the property, unless waived;
- the proposed transfer addresses applicable environmental responsibilities to the satisfaction of the Secretary concerned; and
- the proposed transfer is in the best interest of the Government.<sup>33</sup>

In the event multiple acceptable applications for the same piece of BRAC property are submitted, the Secretary must consider, in order:

- the need to perform the national defense missions of the Department of Defense and the Coast Guard;
- the need to support the homeland defense mission; and
- the LRA’s comments as well as other factors in the determination of highest and best use.<sup>34</sup>

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<sup>26</sup> “Excess” property is defined as “property under the control of a federal agency that the head of the agency determines is not required to meet the agency’s needs or responsibilities.” 40 U.S.C. § 102(3); 32 C.F.R. § 174.3(e).

<sup>27</sup> 32 C.F.R. § 174.7(a), (c).

<sup>28</sup> *Id.* at § 174.7(d).

<sup>29</sup> *Id.* at § 174.7(e).

<sup>30</sup> *Id.* at § 174.7(h).

<sup>31</sup> *Id.* at § 174.7(f).

<sup>32</sup> *Id.* at § 174.7(g).

<sup>33</sup> *Id.* at § 174.7(i).

<sup>34</sup> 32 C.F.R. § 174.7(j).



If, after consideration of the applications, a determination is made that a federal-to-federal transfer is appropriate, the transfer may occur with or without compensation.<sup>35</sup> However, DOD regulations require that if the property is being transferred out of DOD, “fair market value reimbursement to the Military Department” be made unless the obligation is “waived by the Office of Management and Budget and the Secretary concerned, or a public law specifically provides for a non-reimbursable transfer.”<sup>36</sup> If the federal agency receiving the property fails to provide fair market value reimbursement, the property is to be declared “surplus”<sup>37</sup> and disposed of in accordance with applicable laws.<sup>38</sup> If no DOD components or other federal agencies pursue acquisition, or if DOD denies an application for transfer, the property is determined to be surplus and the disposal process begins.

### **Public Domain Lands<sup>39</sup>**

Simultaneous to the DOD component or other agency review process, and prior to a final determination that the BRAC property is surplus, DOD must determine whether the installation includes “public domain lands.”<sup>40</sup> If the lands comprising the closed or realigned installation were originally withdrawn from the public domain for use as a military facility, then, in accordance with FPASA, the Department of the Interior (DOI), acting through the Bureau of Land Management (BLM), may review the property and decide whether the land is suitable for return to the public domain.<sup>41</sup> If DOD decides it will not retain the property for one of its components, it issues a Notice of Intent to Relinquish.<sup>42</sup> It is then the responsibility of the BLM to determine if the land is suitable to be returned to the DOI or if it should be disposed of under the Base Closure Act.<sup>43</sup> Because BRAC property withdrawn from the public domain would not be listed in the notice of availability sent to DOD components and other federal agencies, is not clear whether a period for federal-to-federal transfers, as described above, would be available if BLM rejects the property.

## **Transfers for Non-Federal Utilization**

### **Homeless Assistance**

The Stewart B. McKinney Homeless Assistance Act<sup>44</sup> which allows “excess,” “surplus,” “unutilized,” and “underutilized” federal property to be used as homeless shelters, previously applied to BRAC closures.<sup>45</sup> However, the Base Closure Community Development and Homeless

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<sup>35</sup> Base Closure Act; § 2905(b)(2)(C).

<sup>36</sup> 32 C.F.R. § 174.7(h)(8).

<sup>37</sup> “Surplus” property is defined as “excess property that the Administrator determines is not required to meet the needs or responsibilities of all federal agencies.” 40 U.S.C. § 102(10); 32 C.F.R. § 174.3(l).

<sup>38</sup> 32 C.F.R. § 174.7(k).

<sup>39</sup> Public domain lands are lands owned by the United States for the benefit of the citizens of the United States.

<sup>40</sup> 32 C.F.R. § 174.7(l).

<sup>41</sup> *Id.*

<sup>42</sup> 32 C.F.R. § 174.7(l)(4).

<sup>43</sup> 32 C.F.R. § 174.7(l)(5), (6).

<sup>44</sup> 42 U.S.C. § 11411.

<sup>45</sup> *Id.* at § 11411(a).

Assistance Act of 1994 changed the process for BRAC properties closed after October 25, 1994.<sup>46</sup> The Secretary of Defense is required to publish notice of available property and to submit information on the property to the U.S. Department of Housing and Urban Development (HUD), as well as to the LRA for that particular installation.<sup>47</sup> All interested parties, including representatives of the homeless, are then to submit to the LRA a notice of interest in the property.<sup>48</sup> The LRA is to consider “the interests in the use to assist the homeless of the buildings and property at the installation that are expressed in the notices submitted to the redevelopment authority ...” in preparing its redevelopment plan.<sup>49</sup> Upon completion of its plan, the LRA submits it to the Secretary of HUD and the Secretary of Defense for review.

The Secretary of HUD is authorized to review the plan, negotiate with the LRA for changes, and based on statutorily prescribed factors determine whether the plan is acceptable.<sup>50</sup> Upon HUD approval, the base redevelopment plan, including any homeless assistance component and agreement to implement no cost homeless assistance property conveyances, is submitted to DOD. DOD is required to give the redevelopment plan’s homeless assistance recommendations “substantial deference.”<sup>51</sup> The Base Closure Community Development and Homeless Assistance Act of 1994, as originally enacted, required the Secretary of Defense to dispose of the property according to the LRA plan, including any homeless assistance designations.<sup>52</sup> The substantial deference requirement, added by the Base Closure Act, appears to clarify DOD’s authority to dispose of property in a manner inconsistent with the LRA redevelopment plan, as long as the required level of deference was afforded.<sup>53</sup>

## **Public Benefit Transfers**

Public benefit transfers are authorized under FPASA and allow for conveyance of property at a discount or for no cost for specified public purposes.<sup>54</sup> Only certain entities may acquire property through a public benefit transfer, and the categories of acceptable recipients vary according to the type of public benefit use contemplated. For instance, transfers for use in the protection of public health may be to a state, a public subdivision or instrumentality of a state, a tax-supported medical institution, or a 501(c)(3) nonprofit hospital or similar institution.<sup>55</sup>

DOD is required to inform the various agencies exercising authority over public benefit transfer programs of potentially available property and to inform the relevant LRA of any interest

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<sup>46</sup> P.L. 103-421, 108 Stat. 4346 (1994).

<sup>47</sup> Base Closure Act, § 2905(b)(7); 32 C.F.R. § 176.20.

<sup>48</sup> 32 C.F.R. § 176.20(c).

<sup>49</sup> Base Closure Act, § 2905(b)(7)(F)(i).

<sup>50</sup> Base Closure Act, § 2905(b)(7)(H).

<sup>51</sup> Base Closure Act, § 2905(b)(7)(K)(iii) (while the term “substantial deference” is not further defined by the Base Closure Act or DOD regulations, judicial application of the term may be instructive. *See, e.g., Chevron v. NRDC*, 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997)).

<sup>52</sup> P.L. 103-421, 108 Stat. 4346 (1994).

<sup>53</sup> Base Closure Act, § 2905(b)(7)(K)(iii).

<sup>54</sup> *See* 40 U.S.C. §§ 541 *et seq.*, 49 U.S.C. §§ 47151-47153 (authorized transfers include uses for airports, historic monuments, education, national service activities, public parks and recreation, low income assistance housing, and public health purposes).

<sup>55</sup> *Id.* at § 550(d).

expressed by agencies.<sup>56</sup> The LRAs are encouraged to coordinate with interested parties and make a reasonable effort to incorporate their interests within the redevelopment plan.<sup>57</sup> However, there is no requirement that their interests be included in the redevelopment plan, they must only be considered by the LRA.<sup>58</sup> DOD is also required, through the military departments, to conduct an official public benefit transfer screening in accordance with the Federal Property Management Regulations based on potential uses identified in the redevelopment plan. If a public transfer is made, the transferring instrument will generally contain various binding “terms, conditions, reservations, and restrictions” to ensure the use of the property for the purposes for which it was transferred.<sup>59</sup> The LRA is responsible for the implementation of and compliance with the legally binding terms.<sup>60</sup> In the event the agreement is violated and the property reverts to the LRA, the LRA is responsible for ensuring the future utilization of the property.<sup>61</sup>

## **Conservation Conveyances**

If BRAC property remains available after it has been considered for both a federal-to-federal transfer and a public benefit conveyance, DOD is authorized to transfer BRAC property via a conservation conveyance.<sup>62</sup> To be eligible for a conservation conveyance the property must be suitable and desirable for conservation purposes, must have been made available for a public benefit transfer “for a sufficient period of time,” and must not be subject to a pending request for a public benefit transfer or for transfer to another federal agency.<sup>63</sup> In general, a conservation conveyance is to be for reduced cost.<sup>64</sup> The conveyance may be made to a state or qualified nonprofit entity for conservation purposes and must be subject to a reversionary clause authorizing the United States to reclaim the property should the use for conservation purposes cease.<sup>65</sup> With the concurrence of the Secretary of the Interior, DOD may grant the release from a covenant restricting future conveyances, but only if fair market value for the property is paid.<sup>66</sup>

## **Public Auction and Negotiated Sale**

In accordance with FPASA, DOD may dispose of BRAC property via public auction or through a negotiated sale with a single purchaser.<sup>67</sup> The public auction process requires public advertising for bids under terms and conditions that permit “full and free competition consistent with the value and nature of the property involved.”<sup>68</sup> If adequate bids are received and disposal is in the

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<sup>56</sup> 32 C.F.R. § 176.45.

<sup>57</sup> 32 C.F.R. § 176.20.

<sup>58</sup> *Id.*

<sup>59</sup> 40 U.S.C. § 550(b).

<sup>60</sup> 32 C.F.R. § 176.45(d).

<sup>61</sup> 32 C.F.R. § 176.45(e) (a preference exists for the LRA to utilize the property to assist the homeless, but it is not a requirement).

<sup>62</sup> 10 U.S.C. § 2694a.

<sup>63</sup> *Id.* at § 2694a(a).

<sup>64</sup> *Id.* at § 2694a(g).

<sup>65</sup> *Id.* at § 2694a(b), (c).

<sup>66</sup> *Id.* at § 2694a(d) (under certain circumstances the Secretary may accept less than fair market value for the property).

<sup>67</sup> 40 U.S.C. § 545.

<sup>68</sup> *Id.* at § 545(a)(2).

public interest, the bid most advantageous to the federal government is to be accepted.<sup>69</sup> A negotiated sale is permissible when: (1) it is necessary in the public interest; (2) the public health, safety, or national security will be promoted by particular disposal of personal property; (3) a public exigency makes an auction unacceptable; (4) a public auction would adversely impact the national economy; (5) fair market value does not exceed \$15,000; (6) a public auction has failed to produce acceptable bids; (7) the character of the property makes public auction impractical; (8) disposal is to a state, territory, or U.S. possession; or (9) negotiated sale is authorized by other law.<sup>70</sup>

## **Economic Development Conveyances (EDCs)**

In addition to FPASA authorities, the Base Closure Act has since its enactment provided for EDCs in one form or another. Under its EDC authority, DOD may convey BRAC property to a LRA for less than fair market value. From 1994 until the 1999 and 2001 amendments to the Base Closure Act, the Secretary of Defense was authorized to “transfer real property and personal property located at a military installation to be closed ... to the redevelopment authority ... for consideration at or below the fair market value of the property transferred or without consideration.”<sup>71</sup> The reduced or no cost conveyance was authorized when it was determined to be necessary to support economic development and when DOD could show that other transfer authorities were insufficient.<sup>72</sup>

Amendments to the Base Closure Act in 1999 and 2001 significantly altered the requirements applicable to the use of an EDC.<sup>73</sup> Under section 2905(b), the broad discretion of the Secretary of Defense to authorize reduced or no consideration economic development conveyances was replaced by arguably a more restrictive scheme. Among the changes, for installations closed after January 1, 2005, the Secretary was required to “seek to obtain consideration in connection with any transfer ... in an amount equal to the fair market value of the property, as determined by the Secretary.”<sup>74</sup> However, transfers of property without consideration, in limited circumstances, were authorized. The law provided that: “the transfer of property of a military installation ... may be without consideration” only when the transferee agrees to specified terms.<sup>75</sup> These terms include a requirement that the recipient LRA use the proceeds from certain future sales or leases of the acquired property to support economic redevelopment at the former installation and accept control of the property “within a reasonable time after the date of the property disposal record of decision.”<sup>76</sup>

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<sup>69</sup> *Id.* at § 545(a)(4).

<sup>70</sup> *Id.* at § 545(b).

<sup>71</sup> P.L. 103-160, § 2903 (1994).

<sup>72</sup> *Id.* (Additionally, a no consideration transfer was formerly required when a closure was to take place in a rural area and would cause “a substantial adverse impact (as determined by the Secretary) on the economy of the communities in the vicinity of the installation and on the prospect for economic recovery....” P.L. 103-160, § 2903, *amended by* P.L. 106-65) For a discussion of the policy behind EDC, see Randall S. Beach, *Swords to Plowshares: Recycling Cold War Installations*, 15 PROB. & PROP. (2001).

<sup>73</sup> Act of October 5, 1999, P.L. 106-65, 113 Stat. 512; P.L. 107-107, § 3006. Bases closed under previous BRAC law but still owned by the Department of Defense may be included under the new statutory framework, and certain existing contracts may be modified to comply with the updated law.

<sup>74</sup> Base Closure Act, § 2905(b)(4)(B); see also 32 C.F.R. § 174.9(b).

<sup>75</sup> P.L. 106-65, *amended by* P.L. 107-107.

<sup>76</sup> Base Closure Act, § 2905(b)(4)(B)(ii).

However, in 2009, noting that many “negotiations between the Department of Defense and local redevelopment authorities ... over the value of property to be disposed under an economic development conveyance (EDC) have stalled over the past 2 years due to difficulties in the nation’s financial markets, the deterioration of local economic conditions, and the potential of legislative changes,”<sup>77</sup> Congress further amended the Base Closure Act with respect to utilization of a no cost EDC. The requirement that the Secretary seek consideration in an amount equal to the fair market value of the property has been removed. The law now allows that the transfer of property “may be for consideration at or below the estimated fair market value or without consideration.”<sup>78</sup> The determination of what consideration is to be received, if any, “may account for the economic conditions of the affected community and the estimated costs to redevelop the property.”<sup>79</sup> The Secretary is authorized to accept as consideration: a share of the revenues the LRA receives from the property; goods and services; real property and improvements; or other consideration the Secretary considers appropriate.<sup>80</sup> The amendment does not change the requirement that the LRA use proceeds from the acquired property to support economic redevelopment.<sup>81</sup>

The LRA may apply for an EDC after completion of its redevelopment plan. An application must be submitted consistent with a schedule devised by the Secretary of the transferring DOD component.<sup>82</sup> The Secretary concerned, when practicable, provides a preliminary determination within 30 days of receipt as to whether the Military Department can accept the application for negotiation of terms and conditions.<sup>83</sup> The LRA application shall include a “description of how the EDC will contribute to short- and long-term job generation on the installation” and provide a “description of the economic impact of closure or realignment on the local community.”<sup>84</sup> Further, the application shall contain a statement “describing why an EDC will more effectively enable achievement of the job generation objectives of the redevelopment plan regarding the parcel requested for conveyance than other federal real property disposal authorities.”<sup>85</sup> The transferring Secretary is required to evaluate the application and its proposed terms and conditions in accordance with a series of prescribed factors, including the economic effects on the community of the proposed EDC, the interests and concerns of other federal agencies, and the economic benefit to the United States.<sup>86</sup> The regulations addressing an EDC without consideration if the LRA agrees that “proceeds from any sale or lease of the property ... during at least the first seven years ... [following transfer] shall be used to support economic redevelopment....” do not appear

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<sup>77</sup> U.S. Congress, *National Defense Authorization Act for Fiscal Year 2010*, Conference Report to accompany H.R. 2647, 111<sup>th</sup> Cong., 1<sup>st</sup> sess., October 7, 2009, H.Rept. 111-288 (Washington: GPO, 2009), p. 883.

<sup>78</sup> P.L. 111-84, § 2715 (2009).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 32 C.F.R. § 174.9(c).

<sup>83</sup> *Id.* at § 174.9(e).

<sup>84</sup> *Id.* at § 174.9(d).

<sup>85</sup> *Id.* at § 174.9(d)(5) (All elements to be addressed by the LRA in its application for an EDC are contained in 32 C.F.R. § 174.9(d)(1) – (9)).

<sup>86</sup> *Id.* at § 174.9(e). (Prior to 2009, the Secretary was required to appraise the property, utilizing the most recent edition of the *Uniform Appraisal Standards for Federal Land Acquisitions*, and determine its fair market value prior to accepting an application. Additionally, prior regulations, since reversed, required the Secretary to seek to obtain consideration at least equal to the fair market value as part of an EDC.).

to be in conflict with the amended law.<sup>87</sup> The authorized uses to support economic redevelopment, unchanged by the 2009 amendment, are:

- road construction;
- transportation management facilities;
- storm and sanitary sewer construction;
- police and fire protection facilities and other public facilities;
- utility construction;
- building rehabilitation;
- historic property preservation;
- pollution prevention equipment or facilities;
- demolition;
- disposal of hazardous materials generated by demolition;
- landscaping, grading, and other site or public improvements; and
- planning for or the marketing of the development and reuse of the installation.<sup>88</sup>

If the LRA does not utilize the funds in support of economic redevelopment, DOD is authorized under the Base Closure Act to recoup the portion of the proceeds received by the LRA in an amount it deems appropriate.<sup>89</sup>

## **Leases**

In addition to the final conveyance of property contemplated by the Base Closure Act, federal law authorizes the leasing of BRAC property to both federal and non-federal lessees.

### ***Leaseback***

The law and regulations authorize what has been referred to as a “leaseback,” an arrangement wherein the transferring Secretary conveys property to a LRA and the LRA agrees to lease the property to a federal agency.<sup>90</sup> Under the regulations, this arrangement will only be used if the agency that would lease the property agrees to the arrangement, the LRA and the agency can agree to lease terms, and the transferring Secretary determines the arrangement is in the interest of the DOD component or agency.<sup>91</sup> The leases are to be for terms of no more than fifty years, subject to renewal, and cannot require rental payments.<sup>92</sup>

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<sup>87</sup> Base Closure Act, § 2905(b)(4)(i); 32 C.F.R. § 174.9(d)(8).

<sup>88</sup> Base Closure Act, § 2905(b)(4)(C); 32 C.F.R. § 174.9(d)(8)(i)-(xii).

<sup>89</sup> Base Closure Act, § 2905(b)(4)(D); 32 C.F.R. § 174.9(j).

<sup>90</sup> Base Closure Act, § 2905(b)(4)(E); 32 C.F.R. § 174.12.

<sup>91</sup> 32 C.F.R. § 174.12(f).

<sup>92</sup> *Id.* at §174.12(h).

### ***Non-Federal Lessee***

While the Base Closure Act does not specifically provide for the authority to lease property to non-federal lessees, it does indicate that proceeds from leases are to be deposited into a BRAC-specific account.<sup>93</sup> The authority for non-federal leases is contained in 10 U.S.C. § 2667, the same statute governing the leasing of non-BRAC military property.<sup>94</sup> DOD's regulations identify that the leasing of BRAC properties prior to final disposition "may facilitate state and local economic adjustment efforts and encourage economic development, but the Secretary concerned will always concentrate on the final disposition of real and personal property."<sup>95</sup> Lessees must generally pay fair market value; however, less than fair market value consideration is authorized if the Secretary finds that:

- a public interest will be served as a result of the lease; and
- the fair market value of the lease is unobtainable or not compatible with such public benefit.<sup>96</sup>

Prior to a BRAC property being leased, the law requires DOD to consult with the Administrator of the Environmental Protection Agency (EPA) to determine whether the property is in suitable condition for leasing.<sup>97</sup> In general, NEPA requires federal agencies to analyze the environmental impacts of a proposed federal action and alternatives to that action.<sup>98</sup> The statute governing BRAC property leases indicates that the scope of environmental analysis required is "limited to the environmental consequences of activities authorized under the proposed lease and the cumulative impacts of other past, present, and reasonably foreseeable future actions during the period of the proposed lease."<sup>99</sup> However, this relief from full application of NEPA does not apply if activities authorized under the lease would:

- significantly affect the quality of the human environment; or
- irreversibly alter the environment in a way that would preclude any reasonable disposal alternative of the property concerned.<sup>100</sup>

Additional regulatory and statutory provisions indicate that leases of BRAC property are intended to be short-term, interim measures to spur economic development pending final disposition, and therefore these leases "make no commitment for future use of ultimate disposal."<sup>101</sup> More specifically, the regulations indicate that lease terms may extend up to five years, including renewal options, if the lease is entered into prior to completion of the final disposal decision.<sup>102</sup> After completion of the final disposal decisions, the lease term may be longer than five years.<sup>103</sup>

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<sup>93</sup> Base Closure Act, §§ 2906, 2906A; *see also* 10 U.S.C. § 2667(e)(5).

<sup>94</sup> 10 U.S.C. § 2667(g).

<sup>95</sup> 32 C.F.R. § 174.11(a).

<sup>96</sup> *Id.* at § 174.11(b).

<sup>97</sup> 10 U.S.C. § 2667(g)(3).

<sup>98</sup> 42 U.S.C. §§ 4321 *et seq.*

<sup>99</sup> 10 U.S.C. § 2667(g)(4)(A).

<sup>100</sup> *Id.* at § 2667(g)(4)(C).

<sup>101</sup> 32 C.F.R. § 174.11(c); *see also* 10 U.S.C. § 2667(g)(4)(B).

<sup>102</sup> 32 C.F.R. § 174.11(c).

<sup>103</sup> *Id.*

When a lease is to a LRA and is provided at below fair market value and the property is later subleased, the LRA is required to apply the proceeds to the “protection, maintenance, repair, improvement, and costs related to the [leased] property....”<sup>104</sup>

## Conclusion

The Base Closure Act and the FPASA primarily governed the transfer and disposal process for 2005 round BRAC properties. The process first requires screening to determine if other DOD components or federal agencies have a need for the property. In the event that property is not transferred in this manner, it is deemed surplus and may be disposed of pursuant to BRAC and FPASA authorities. Compliance with these authorities generally requires an analysis of suitability for homeless assistance or a public benefit transfer. DOD is directed to take into consideration multiple factors in determining which authority to use, including consultation with LRAs and their redevelopment plans, but DOD appears to be ultimately responsible for making final determinations. Public auctions and negotiated sales are generally available, although it would appear that fair market value must generally be obtained under these authorities. EDCs are authorized as well, which may be made for no consideration, contingent upon certain conditions of transfer.

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<sup>104</sup> *Id.* at § 174.11(d).